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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTORIA FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), preclusive effect should be given to a judicially unreviewed state agency finding of no probable cause so as to bar a subsequent action in federal court under the Age Discrimination In Employment Act of 1967.

LIST OF PARTIES

The parties to the proceedings below were Petitioner-Appellant, Astoria Federal Savings and Loan Association, and Respondent-Appellee, Angelo J. Solimino. Briefs *amicus curiae* were filed by the Equal Employment Opportunity Commission and the American Association of Retired Persons in the Second Circuit. Counsel for the Equal Employment Opportunity Commission presented oral argument to the Court of Appeals.

LISTING PURSUANT TO RULE 29.1

Astoria Federal Savings and Loan Association has no parent company but has the following wholly owned subsidiaries:

AF Equities Corp.
AF Staten Island Development Corp.
AF Roosevelt Avenue Corp.
AF Astoria Corp.
AF Woodside Corp.
AF Glen Cove Corp.
AF Cortland Corp.
AF Agency, Inc.

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REFERENCE TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at ___ F.2d ___,[1] and is reprinted in the Appendix beginning at (A.1).[2] The opinion of the United States District Court for the Eastern District of New York is reported at 715 F. Supp. 42, and is reported in the Appendix at (A.14).

STATEMENT OF GROUNDS OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit Court of Appeala on April 12, 1990.

This Court has jurisdiction of this petition pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (the "ADEA") and the New York Human Rights Law, N.Y. Executive Law, §§290-301 (N.Y. McKinney's Consol. Laws 1982 & Supp. 1990). The pertinent sections of these statutes are reprinted in the Appendix at A.30-A.43.

PROCEEDINGS BELOW

Respondent, Angelo J. Solimino ("Solimino") was employed by Petitioner, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION ("Astoria Federal") from October 4, 1945 until March 5, 1982, when, at age 63, he was terminated from his position as Vice-President of the Mortgage Origination Department. (A.3).

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[1] The Second Circuit's slip opinion is reproduced in the Appendix to this Petition; the official report was not available at the time this Petition was prepared.

[2] References preceded by an "A." are to page numbers of the Appendix to this Petition.

The Court of Appeals found that, on March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC referred the matter to the New York State Division of Human Rights pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and the State Human Rights Law, N.Y. Exec. L., §§ 290-301, which also bars age discrimination in employment, the New York State Division of Human Rights ("DHR") assigned the matter to a staff member for investigation. (A.3).[3]

The DHR human rights specialist who investigated the matter issued an Investigative Report on October 5, 1982 in which she summarized the positions of the parties and the evidence theretofore submitted, and on November 29, 1982, conducted a hearing. (A.3). The hearing was attended by both parties and their counsel. Witnesses presented by each party gave sworn testimony. (A.3). A transcript of approximately 80 pages resulted from the testimony of the five witnesses (including Respondent Solimino and the president of Astoria Federal) and the arguments of the parties' counsel.[4] Both sides had an opportunity to examine and cross-examine witnesses and present argument on behalf of their respective positions.

On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged age discrimination had occurred. (A.3). The State Human Rights Appeal Board affirmed this determination on May 30, 1984, after

[3] The charge form which Solimino filed with the EEOC had the typed name of the "NYS Division of Human Rights" inserted just below the printed name of the Commission, and although it specifically alleged age discrimination, it did not cite either the ADEA or the State Human Rights Law as a basis for jurisdiction. Thus, it appears that the charge was intended to invoke the respective jurisdictions of both agencies. It also appears that the DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state law.

[4] The swearing of witnesses and the presence of a court stenographer were at the insistence of Solimino.

giving Solimino the opportunity to submit a brief and to present oral argument. (A.3-4).[5] The DHR's finding was never judicially reviewed. (A.4).[6]

As the Second Circuit also found, during the pendency of his appeal before Appeal Board, Solimino began an action on July 29, 1983 in State Supreme Court, New York County, against certain Astoria Federal officers and DHR employees and Astoria Federal's law firm for wrongful termination, prima facie tort, perjury and conspiracy. This action, however, did not explicitly seek judicial review of the DHR's findings as to Solimino's age discrimination claim. (A.4).[7] The Supreme Court dismissed the complaint against some of the defendants on April 16, 1984, and as to the remaining parties on May 10, 1984. The Appellate Division affirmed these dismissals a year later. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dept. 1985)(A.4).

[5] In dismissing the complaint and closing the file on January 25, the DHR had noted, "The Division and the Appeal Board are separate agencies."

[6] Under N.Y. Exec. L., §298, as it then read, Solimino had thirty days in which to seek judicial review in the Appellate Division of the New York State Supreme Court. L. 1951, c. 800. (The Appeal Board was subsequently abolished. L. 1985, c. 340 § 1. Under the same amendment, judicial review could be sought from an order of the DHR by instituting proceedings in the State Supreme Court (trial court) in the appropriate county. *Id.* § 298.)

In a formal Notice accompanying its Order, the Appeal Board advised Solimino of his right to seek judicial review, but noted:

> A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer v. Chemical Construction Company*, 456 U.S. 461 (1982).

There was no reference, however, as to the effect of state judicial review on a later suit in federal court under the ADEA. The Order of the State Human Rights Appeal Board is reprinted in the Appendix at A.44.

[7] Under New York law in effect in 1983, judicial review of a DHR "no cause" finding was available only in the Appellate Division, and then, only after the complainant had exhausted his remedies before the Appeal Board. Exec. L., § 298 (L.1951 c. 800).

On February 21, 1985, Solimino brought this action under the ADEA against Astoria Federal in the United States District Court for the Eastern District of New York, maintaining that Petitioner had unlawfully denied him promotions and raises and terminated him because of his age. (A.4). Astoria Federal moved for summary judgment on February 23, 1989, alleging, *inter alia*, that the DHR's prior judicially unreviewed finding that Solimino's treatment and termination did not result from age discrimination precluded Solimino's federal suit under the ADEA. (A.4).

The District Court granted Astoria Federal's motion on administrative estoppel grounds.[8] It agreed that the DHR hearing and determination, although unreviewed by the state courts, had a preclusive effect on Solimino's ADEA federal court action. (A.19). The District Court concluded that common-law rules of preclusion applied to the DHR proceedings and that nothing in the ADEA overcame the presumptively preclusive effect of the state agency findings. (A.27-A.28). The Court also rejected Solimino's argument that the state agency hearing failed to meet the requirements of due process, and found that the DHR findings bound the Court. (A.28-A.29).

The Court of Appeals reversed. Persuaded from its review of the ADEA "that Congress intended that a finding of no discrimination by a state agency which has not been judicially reviewed should have no preclusive effect in federal court" (A.6), it remanded the case for further proceedings. (A.13).[9]

This proceeding followed.[10]

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[8] It rejected that prong of Astoria Federal's motion based on statute of limitations grounds. (A.16-A.18). The statute of limitations issue was not raised in the Court of Appeals and is not sought to be reviewed here.

[9] Because of its decision, the Second Circuit did not reach the issue whether the state administrative proceedings in this case satisfied due process and should bind the District Court under principles of administrative estoppel.

[10] The Court of Appeals has stayed its mandate pending the filing of this petition.

REASON FOR GRANTING THE WRIT

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER, UNDER THIS COURT'S DECISION IN *UNIVERSITY OF TENNESSEE V. ELLIOTT*, 478 U.S. 788 (1986), PRECLUSIVE EFFECT SHOULD BE GIVEN TO A JUDICIALLY UNREVIEWED STATE AGENCY FINDING OF NO PROBABLE CAUSE SO AS TO BAR A SUBSEQUENT ACTION IN FEDERAL COURT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

This Court should grant *certiorari* to resolve a conflict in the circuits as to whether judicially unreviewed state administration findings that a complainant was not unlawfully discriminated against on the basis of age should preclude a later federal court suit under the ADEA on the same complaint.

As the Second Circuit observed, this conflict has its genesis in this Court's 1986 decision addressing a similar preclusion issue under Title VII of the Civil Rights Act of 1964[11] and 42 U.S.C. §1983:

> In *University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986), the Supreme Court held with respect to suits under Title VII, which prohibits employment discrimination on the basis of race, color, sex, religion or national origin, that Congress intended to give no preclusive effect to judicially unreviewed findings of a state agency. In contrast, the Court held that Congress did intend to give preclusive effect to findings in suits under 42 U.S.C. §1983, which prohibits deprivation of civil rights by state officials acting under color of state law. *Id.* at 796-99. Since *Elliott*, two circuit courts have differed as to whether, in enacting the ADEA, Congress intended to give preclusive effect to

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[11] 42 U.S.C. §2000e, *et seq.* (1985)

findings of a state agency which have not been judicially reviewed. *See Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987)(finding for grievant on issue at bar); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)(*contra*)(one judge dissenting).

(A.5).[12]

A. The Courts Below Had To Choose Between Conflicting Interpretations And Results Over The Issue Of Preclusive Effect: The Split Between The Seventh Circuit (Duggan) and Eighth Circuit (Stillians).

The circuit courts in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) and *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)(one judge dissenting), followed fundamentally different approaches in deciding the issue of administrative preclusion under the ADEA to reach opposite conclusions.

The Seventh Circuit, in *Duggan*, concluded that Title VII of the Civil Rights Act of 1964 and the ADEA should be construed

[12] In a footnote to the quoted passage, the Court of Appeals observed that the question had produced opposing results even in the district from which this case arose, comparing Judge Glasser's opinion in this case with the opinion of Judge Dearie in *Ibrahim v. New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988)(citing *Duggan* and rejecting *Stillians*). *Id.* at A.5 n.1. The court also noted that "[o]ther courts have faced this question of Congressional intent without fully resolving it," citing *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986) (preclusion permissible where agency acted in a judicial capacity and gave grievants an adequate opportunity to litigate, citing *Elliott*, but without discussing its applicability to the ADEA; case decided on grievant's lack of opportunity to litigate); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987)(preclusion inapplicable where grievants had inadequate opportunity to litigate their claims in the state agency, and stating in dictum that it was disinclined to believe Congress intended preclusion to apply);and *Frank v. Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-38 (S.D.N.Y. 1988)(declining to reach the issue of Congressional intent to give preclusive effect when grievant did not litigate the same issues and claims in state agency).

alike based on a comparison of their respective deferral mechanisms. Observing that the deferral mechanism of the ADEA was patterned after Title VII, and that both statutes provide state agencies with only a limited opportunity to resolve discrimination claims before a federal suit could be filed, the Court said "it is unlikely that Congress intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." 818 F.2d at 1295. The Court also said that if unreviewed state administration findings were given *res judicata* effect in a federal court action, the concurrent or subsequent EEOC investigation authorized by the statute would be superfluous, and it would be anomalous to give such state findings conclusive effect when the findings of the EEOC itself would not preclude *de novo* judicial review. *Id.* at 1295.

The Eighth Circuit in *Stillians*, however, explicitly rejected the *Duggan* approach of "reason[ing] by analogy" to Title VII as well as its refusal to give preclusive effect to judicially unreviewed state agency findings in federal court suits under the ADEA. 843 F.2d at 281. The *Stillians* Court favored a stand-alone examination of the ADEA which, in light of the common law presumption of preclusion discussed in *University of Tennessee v. Elliott*, 478 U.S. 788, 796-798 (1986), fully supported giving such preclusive effect. It noted, in particular, that this Court, in *Elliott*, relied on Title VII's unique requirement that the EEOC give "substantial weight" to the findings of state agencies, a directive that could not be reconciled with giving preclusive effect to those findings in Civil Rights Act cases. *Id.* at 281, *citing* 478 U.S. at 3224. Such language, if discussed, was missing from the ADEA. "Absent an affirmative showing of Congressional intent to derogate from the common law," it said, "ADEA claims may be precluded by prior unreviewed state administrative determinations." 843 F.2d at 281.[13]

[13] The Eighth Circuit also concluded that traditional rules of preclusion apply where the administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *Id.* at 281 n.3.

The Second Circuit in the present case chose to follow *Duggan*.[14] In this, it was wrong. The reasoning of the Seventh and Second Circuits is flawed; sustaining it would cause uncertainty in the administration of the ADEA and waste of the resources of state and federal fair employment practice agencies. This Court should grant *certiorari* to decide that the *Stillians* approach is correct, and that, under the ADEA, federal courts may grant preclusive effect to unreviewed administrative decisions of state agencies in appropriate cases.

As we show next, this case provides a suitable vehicle for review since the District Court and the Court of Appeals, like the Seventh and Eighth Circuits, approached this case differently and reached conflicting conclusions.

B. The District Court Here Correctly Followed The *Stillians* Approach Based on Its Reading of *Elliott*.

In the present case, the District Court read *Elliott* as placing the burden on the plaintiff to show why administrative estoppel should not apply. "*Elliott* teaches," it said,

> that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common law rules of preclusion [.]" *Id.*, 478 U.S. at 797. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.
>
> That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion.

(A.21). The District Court viewed *Stillians* as "hold[ing], in essence, that the presumption favoring retention of common-law

[14] The District Court relied on *Stillians* to hold that Solimino's ADEA suit was precluded by the DHR's "no-cause" finding. (A.27-A.28).

rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings." (A.22).

The District Court rejected the approach followed in *Duggan*. It found that the Seventh Circuit's opinion depended upon the "debatable assumption" that the Supreme Court in *Elliott* "became so thoroughly distracted by 'the most obvious piece of evidence' favoring preclusion in ADEA cases — *i.e.*, the 'substantial weight' provision contained in [§ 706(b) of Title VII] §2000e-5(b)[15] that it failed to articulate the true basis of its decision — *i.e.*, the lack of deference implicit in the structure of Title VII's 'deferral mechanisms'." (A.26). The District Court refused to make such an assumption, stating that this Court was capable of articulating its reasoning and that its reasoning in *Elliott is* clearly articulated. (A.26).

The District Court also scored the *Duggan* opinion for improperly conflating the issues of preclusion and deference, which are different in effect and purpose. (A.26). Preclusion, the Court observed, gives the state agency the "last word," whereas deference merely gives it "first crack." *Id.* The proper inquiry under *Elliott* was not to compare the deferral mechanisms of the ADEA with Title VII, it said. Rather, the proper inquiry was whether or not any provision of the ADEA evinces a Congressional intent to contravene the common law rules of preclusion. (A.27). The Court found no provision disclosing such an intent. (A.27). It therefore granted summary judgment to Astoria Federal.

For reasons discussed below, the District Court's decision was correct. Not only did it reflect a proper respect for the allocation of state and federal, administrative and judicial responsibilities under the ADEA, but it demonstrated a fidelity to the

[15] 42 U.S.C. §2000e - 5(b). This provision states in material part:

> In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law pursuant to the requirements of subsections (c) and (d) of this action.

ADEA and willingness to use sound judicial presumptions to reach a sensible result.

C. The Court Of Appeals Here Erroneously Followed the *Duggan* Rationale to Find An Absence of Preclusive Effect.

Based on its analysis of certain provisions of the ADEA, the statute's legislative history, and relying heavily on *Duggan*, the Second Circuit inferred that, regardless of the outcome of judicially unreviewed plenary state administrative proceedings, aggrieved individuals could bring *de novo* suits in federal court under the ADEA. As we shall show, this decision was wrong. We consider the Court of Appeals' arguments *seriatum*.

1. *The statutory language arguments.*

First, the Court of Appeals cited section 14(b) of the ADEA,[16] which says that a plaintiff may not begin a federal court action "before the expiration of sixty days after proceedings have been commenced under the State law, *unless such proceedings have been earlier terminated.*" (A.6)(emphasis supplied by Second Circuit). The Court of Appeals reasoned that Congress would not have permitted the plaintiff to bring an ADEA suit after termination of state agency proceedings if it had intended administrative preclusion to apply. (A.6). It further noted that under the ADEA a person may file a complaint with both the EEOC and the state agency. Therefore, it said, state administrative preclusion would render the EEOC's concurrent investigative jurisdiction superfluous, a result which could not have been intended. (A.6-A.7).

Second, relying on the supersession clause of Section 14(a) of the ADEA,[17] the Court of Appeals determined that Congress must

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[16] 29 U.S.C. § 633(b) (1985)

[17] 29 U.S.C. § 633(a) provides, in material part:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to [age discrimination] except that upon commencement of action under this chapter such action *shall supersede any State action.*

(A.7). (emphasis supplied by Second Circuit.)

have included prior agency fact-finding within the ambit of superseded "state action" and that there would be little reason to "give a grievant a second bite at the apple" if a state administrative decision were intended to bar a federal court from an independent determination. (A.7-A.8).

Contrary to the implication of the Second Circuit's opinion, no provision of the ADEA, by its "plain meaning," *cf. Chandler v. Roudebush*, 425 U.S. 840, 848 (1976)(federal employee entitled to find *de novo* under Title VII), answers the question of preclusion in favor of Solimino. Sections 14(b) and 14(a) do not answer the question. Neither addresses the subject. Read literally, each section could justify a *de novo* federal court action following judicial confirmation of a state administrative finding. Even the Second Circuit recognized such an interpretation would run afoul of *Kremer*. (A.8). Yet, once an exception is made for such preclusion under 28 U.S.C. § 1738, nothing in the ADEA prevents an exception from also being made for common-law or administrative preclusion under *Elliott*. At most, these provisions justify the limited conclusion that "*initial resort* to state administrative proceedings does not deprive an individual of a right to a federal trial *de novo* on [an ADEA] claim." *Cf. Kremer*, 456 U.S. at 477 (construing prior decisions discussing the applicability of § 1738 to Title VII) (emphasis in original).

2. *The legislative history argument.*

Third, the Court of Appeals found that the legislative history clearly indicates that the ADEA was enacted because "some state age discrimination laws were ineffective or inadequately enforced." (A.8). Congress would not have given preclusive effect to state agency determinations in such circumstances, it inferred. (*Id.*).

The legislative history of the ADEA offers no significant support for the Second Circuit's conclusion. Indeed, the Seventh Circuit in *Duggan* recognized that "the ADEA's legislative history

does not help us decide which policies actually lie behind section 633(b)." 818 F.2d at 1296.[18] Inclusion of this clause may indicate that Congress believed "some state age discrimination laws were ineffective or inadequately enforced, before", but beside the point. (A.8). As stated in connection with Title II, "New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination." *Kremer*, 456 U.S. at 473 (citations omitted). This implies that Congress may have been just as content to *permit* preclusion through judicially unreviewed state administration determinations in appropriate cases as it was to disallow it.

3. *The statutory structure arguments.*

Fourth, the Court of Appeals reasoned that since the decisions of the EEOC do not preclude *de novo* fact-finding by the federal courts, Congress could not have intended unreviewed state agency decisions to preclude such fact-finding either. (A.8).

Fifth, the Second Circuit would not presume that Congress intended a grievant, who had no control over the EEOC's decision to refer his ADEA case to a state agency, should be bound by an adverse, judicially unreviewed decision of that agency. (A.10).

Sixth, the Court of Appeals cited a number of provisions in the ADEA which it construed as indicating a Congressional intent to allow an ADEA grievant even earlier and freer access to federal court than Congress has allowed Title VII grievants.

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[18] In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), however, this Court held that "The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination claims." 441 U.S. at 757. As the Seventh Circuit recognized, this rationale would not be inconsistent with federal court and EEOC deference "to findings made after a *completed* state agency investigation." *Duggan*, 818 F.2d at 1296. In the present case, the state agency investigation was finished before the ADEA lawsuit was begun in federal court by Solimino.

(A.10-A.11). Since Congress did not intend Title VII suits to be barred by the preclusive effect given to unreviewed state agency decisions, according to the Second Court, it could not have intended ADEA suits to be so obstructed either. (A.11-A.12).

These arguments are also answerable. The "anomaly" of holding judicially unreviewed state agency findings to be preclusive while denying such effect to EEOC proceedings is merely a consequence of the ADEA's "dual track method of procedure and the respective powers of the EEOC and the state agencies." *Cf. Yellow Freight System, Inc. v. Donnelly*, ___ U.S. ___, ___, 110 S.Ct. 1566, 1569 (1990). So, too, is the impact of the EEOC's procedure by which it routinely defers ADEA charges to state agencies, thus involuntarily (if temporarily) remitting complainants to state procedures. *Duggan*, 818 F.2d at 1296 n.11, *citing* 29 C.F.R. §1626.9 (1986). *See Oscar Mayer*, 441 U.S. at 764 n.11.

These are matters of Congressional will or sufferance, not judicial choice. If Congress does not like the consequences of its handiwork, it can change the law. *Stillians*, 843 F.2d at 280. That ADEA litigants may have "earlier and freer access to federal courts" than Title VII litigants, the Second Circuit's final thrust, argues as forcefully for making complainants like Solimino live with their decision to remain in the state administrative system after sixty days and be bound by its disposition, as it does for following the no-preclusion rule of Title VII. *Stillians*, 843 F.2d at 282. After all, the aggrieved persons could always seek judicial relief after the two-month state agency hiatus, assuming the DHR has not resolved the probable cause issue. State proceedings should be more than a rehearsal for a federal court action.

4. *The argument over the significance of Title VII's "substantial weight" provision.*

Finally, the Second Circuit disagreed with the District Court's reliance on the "substantial weight" provision of Title VII. "[A]s we read *Elliott*," it said, "there is no reason to think that the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." (A.12) (footnote omitted). The

Court of Appeals considered the phrase "only one piece of evidence" cited by this Court in *Elliott*, pointing to its reliance there on *Chandler* (A.12). The Court of Appeals also observed that the "substantial weight" provision was added to Title VII in 1972 in order to increase rather than decrease the EEOC's deference to state agency findings. (A.12-A.13). Therefore, it concluded, its absence from the ADEA could not be read as authorizing a doctrine of preclusion based on unreviewed state agency findings. (A.13).

Chandler simply will not support the weight thrust upon it by the Second Circuit. There, the Court was dealing with a specific statutory provision, Section 717(c) of Title VII, whose "plain meaning," supported by recent legislative history played out "against [a] backdrop of focused debate," a "thorough and meticulous consideration" of and a "controversy centered" on the issue in question — the availability of *de novo* trials for aggrieved employees — should federal government workers also have this right. The clarity of statutory language and strong legislative history present in *Chandler* is absent here. This Court did not have to engage in an inferential exercise based on bits and pieces of statutory structure, as the Court of Appeals has attempted here.

Regardless of the reason the "substantial weight" provision was added to Title VII in 1972 or the proper interpretation of Title VII prior to its addition, it makes the present statutory meaning clear. That no such language was ever included in the ADEA is what is significant here.

"There is no overriding federal policy that discrimination claims be heard in federal court." *Stillians*, 843 F.2d at 282. This Court recently emphasized that very point. *Yellow Freight*, ____ U.S. at ____, 110 S.Ct. at 1570. Indeed, the Court suggested that, in a case such as this, Mr. Solimino might have filed his ADEA suit in state court. *See Id.* at ____, 110 S.Ct. at 1570 (dictum). That being so, it is reasonable to suppose that the decision in *Elliott* was based on "statutory and decisional law unique to Title VII," and not on any general policy favoring federal court participation. *Stillians*, 843 F.2d at 282.

Thus, the reasoning of the Seventh Circuit in *Duggan* and the Second Circuit here is flawed as applied to ADEA claims. It should be rejected in favor of the rationale of *Stillians* and the District Court in this case. Review should be granted to determine the issue of administrative preclusion under the ADEA, and resolve the conflict between the Circuits.

D. The Conflict In The Circuits Exemplified By This Case Should Be Resolved In Favor of Fairness To Litigants And Furtherance Of The Efficient Administration Of Justice.

The conflict between the circuits as to whether judicially unreviewed state agency findings should preclude federal court actions under the ADEA causes much uncertainty in the administration of that statute and in defining the respective roles of the state and federal enforcement agencies and courts. The rights of parties in employment-related age discrimination cases ought not to be left to guesswork by them and second guessing by the courts. If a state agency determination, which has not been reviewed by a state court, can preclude a federal court ADEA suit, then that election of forum and remedies should be clear. If a grievant knew preclusive effect would be given to a state administrative decision, then on the sixty-first day after the state agency received a case from the EEOC, which was still open, a grievant would also know that he or she could choose whether to file suit in district court. The answer to the question of preclusion should be consistent for all ADEA litigants and should not depend on the circuit in which the complainant and respondent happen to be found.

The choice between *Duggan* and *Stillians* is a close one. On the whole, however, the better of the arguments seems to lie with *Stillians*. In the absence of specific statutory authorization, *de novo* review is generally not to be presumed. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 619 n. 17 (1966). Furthermore, except where there is an "affirmative showing" of a "clear and manifest legislative purpose" in the ADEA to the contrary, *cf. Kremer*, 456 U.S. at 485 (involving the applicability of 28 U.S.C. §1738 to Title VII), the common law rule of preclusion requires that when a state agency acting in a judicial capacity resolves

disputes before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same effect to which it would be entitled in the State's courts. *Elliott*, 478 U.S. at 799. No such showing is present here. "That expectation [by the drafters], even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption. . . ." *Cf. Yellow Freight*, ____ U.S. at ____, 110 S.Ct. at 1569 (presumption of State court jurisdiction to hear Title VII cases).

E. The State Administrative Finding Of "No Probable Cause" Satisfies Due Process Requirements For Preclusive Effect.

The District Court rejected Solimino's argument that the proceeding accorded him before the state agency level failed to meet constitutional due process requirements, thus preventing the Court from giving the state determination preclusive effect. (A.28). It correctly found that the elements of administrative estoppel outlined in *Elliott*, 478 U.S. at 797-98, all were present. (A.28-A.29). Thus, the DHR was acting in a judicial capacity, the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them.

Moreover, the courts of New York would give the DHR fact-finding determination preclusive effect. (A.28-A.29). Since the ultimate finding of the DHR was adverse to Solimino[9] and the District Court considered itself bound by this finding, it granted summary judgment to Astoria Federal. (A.29). The Court of Appeals did not address this issue, but evidently assumed, for purposes of decision, that the no cause determination represented "judicially unreviewed DHR findings" that "Solimino's treatment and termination were not due to age discrimination . . . ." (A.4, A.13).

The Determination issued by the DHR, by its express terms as well as a matter of law, meant that the evidence submitted

[9] The Division of Human Rights found that "[t]he record as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age" and that "[t]here is no evidence in the file that complainant's age was a factor in his termination." (A.29).

by Mr. Solimino failed to reveal any merit to his complaint of age discrimination. *See Kremer*, 456 U.S. at 480-81. n.21, 483-85. The procedures afforded Mr. Solimino to present his case were certainly sufficient under the Due Process clause. He was granted a fact-finding hearing before the DHR investigator, where testimony was presented by witnesses for both sides. At Mr. Solimino's request, evidence was given under oath and with a court reporter present. A stenographic transcript was made. Both sides were represented by counsel and had the opportunity to cross-examine. (A.28). Written proofs were submitted earlier in the investigation. The Complainant also availed himself of an appeal to the Human Rights Appeal Board, which affirmed the DHR's Determination after briefing and oral argument by Respondent. (A.3-A.4). This was certainly ample due process under *Kremer*. *Id.* at 483-85 and n.26. The New York courts would give preclusive effect to the findings based on such a hearing. (A.28-A.29).

The petition should be granted to resolve the conflict presented here over the substantial issue of access to the judicial process after the claimant's previous failure at the state agency.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
May 30, 1990

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 441—August Term, 1989

Argued: November 16, 1989 Decided: April 12, 1990

Docket No. 89-7639

ANGELO J. SOLIMINO,

Plaintiff-Appellant,

—v.—

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant-Appellee.

Before:

LUMBARD, FEINBERG, and MESKILL,

Circuit Judges.

Angelo J. Solimino appeals from a summary judgment of the District Court for the Eastern District of New York, Glasser, *J.*, which dismissed his complaint against Astoria Federal Savings and Loan Association under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, on the ground that a prior

judicially unreviewed finding of no discrimination by a state agency precluded Solimino's suit.

Reversed and remanded.

LEONARD N. FLAMM, New York, New York (Hockert & Flamm, New York, New York, Joseph J. Gentile, Long Island City, New York, of counsel), *for Plaintiff-Appellant*.

ANTHONY H. ATLAS, New York, New York (Paul J. Siegel, Sara J. Herrin, Roger S. Kaplan, Jackson, Lewis, Schnitzler & Krupman, New York, New York, of counsel), *for Defendant-Appellee*.

LAMONT N. WHITE, Attorney, United States Equal Employment Opportunity Commission, Washington, DC (Charles A. Shanor, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent Blackwood, Assistant General Counsel, Washington, DC, of counsel), *for amicus curiae United States Equal Employment Opportunity Commission*.

ROBERT L. LIEBROSS, Washington, DC (Steven S. Zaleznick, Cathy Ventrell-Monsees, Washington, DC, of counsel), filed a brief *for amicus curiae American Association of Retired Persons*.

LUMBARD, *Circuit Judge*:

Angelo J. Solimino appeals from a summary judgment of the District Court for the Eastern District of New York, Glasser, *J.*, which dismissed his complaint against Astoria Federal Savings and Loan Association under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). The district court held that Solimino was estopped from proving his case by a judicially unreviewed finding of no discrimination made by the New York State Division of Human Rights ("DHR"). Because Congress intended that federal courts give no preclusive effect in ADEA suits to the judicially unreviewed fact-finding of a state agency, we reverse.

Solimino was employed by Astoria from October 4, 1945 until March 5, 1982, when, at age 63, Astoria terminated his employment as vice-president of the Mortgage Origination Department.

On March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC referred the matter to the DHR pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and New York State Human Rights Law, the DHR assigned it to a human rights specialist, who issued an investigative report on October 5, 1982 and on November 29, 1982 conducted a hearing, attended by all parties and counsel, at which the witnesses of each party gave sworn testimony. On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged discrimination had occurred. The State Human

Rights Appeal Board affirmed on May 30, 1984, after giving Solimino the opportunity to submit a brief and to present oral argument. No court ever reviewed the DHR's findings.

While the administrative appeal was pending, Solimino commenced an action on July 29, 1983 in New York State Supreme Court, New York County, against certain Astoria and DHR employees and Astoria's law firm for ..rongful termination, prima facie tort, perjury and conspiracy. This suit did not seek judicial review of the DHR's findings as to Solimino's age discrimination claim. The court dismissed the complaint against some defendants on April 16, 1984 and as to the remaining defendants on May 10, 1984. The Appellate Division affirmed. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dep't 1985).

On February 21, 1985, Solimino commenced this action against Astoria, alleging that, because of his age, Astoria denied him promotions and raises and terminated his employment in violation of the ADEA. On February 23, 1989, Astoria moved for summary judgment on the grounds that the suit was barred by the statute of limitations and that the DHR's prior unreviewed finding that Solimino's treatment and termination were not due to age discrimination precluded Solimino's federal suit.

In a Memorandum and Order dated May 31, 1989, Judge Glasser granted Astoria's motion on the administrative estoppel ground while denying it on the statute of limitations ground. He held that Congress intended preclusion in federal ADEA suits and that the DHR's finding of no age discrimination was sufficient under the due process clause of the fourteenth amendment to jus-

tify preclusion of Solimino's federal suit. *Angelo J. Solimino v. Astoria Federal Savings and Loan Association*, 715 F. Supp. 42, 51 (E.D.N.Y. 1989). Solimino appeals. The EEOC, which administers the ADEA, has filed a brief *amicus* supporting Solimino's appeal.

In *University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986), the Supreme Court held, with respect to suits under Title VII, which prohibits employment discrimination on the basis of race, color, sex, religion or national origin, that Congress intended to give no preclusive effect to judicially unreviewed findings of a state agency. In contrast, the Court held that Congress did intend to give preclusive effect to such findings in suits under 42 U.S.C. § 1983, which prohibits deprivation of civil rights by state officials acting under color of state law. *Id.* at 796-99. Since *Elliott*, two circuit courts have differed as to whether, in enacting the ADEA, Congress intended to give preclusive effect to findings of a state agency which have not been judicially reviewed. *See Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) (finding for grievant on issue at bar); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988) (*contra*) (one judge dissenting).[1]

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1 There is a conflict of opinion within the Eastern District. Before Judge Glasser in this case held that Congress intended preclusion, Judge Dearie held the opposite in *Ibrahim v. New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) (citing *Duggans* and rejecting *Stillians*).

Other courts have faced this question of congressional intent without fully resolving it. In *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986), the Ninth Circuit held preclusion permissible if the agency acted in a judicial capacity and gave grievants an adequate opportunity to litigate; the court ignored the issue of Congressional intent, although citing *Elliott*, and ultimately ruled that the grievants did not have an adequate opportunity to litigate. In *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987), the

We are persuaded from our review of the ADEA that Congress intended that a finding of no discrimination by a state agency which has not been judicially reviewed should have no preclusive effect in federal court.

First, Section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides that, when alleged age discrimination occurs in a state which has an age discrimination law, the plaintiff may not sue under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, *unless such proceedings have been earlier terminated*" (emphasis added). The natural reading of the emphasized clause is that, if the state proceedings have been earlier terminated, the plaintiff may bring suit in federal court—assuming there has been no state court review of the agency findings—before the sixty-day period ends. We therefore think that Congress would not have allowed plaintiffs to bring suit under the ADEA following termination of state administrative proceedings if it had intended a judicially unreviewed fact-finding in such proceedings to have preclusive effect in the federal suit. Furthermore, under the ADEA, a person may file a complaint with both a state agency and the EEOC, and in such a situation, both agencies undertake their own inquiry. *See* 29 U.S.C. §§ 626(d) and 633(b). If Congress had intended preclusion from judicially unreviewed state agency findings, "the concurrent or subsequent EEOC investigation would be superfluous." *Duggan*, 818 F.2d at 1295.

Eleventh Circuit held that preclusion would not apply because the grievants did not have an adequate opportunity to litigate their claims in the state agency and stated in dictum that it was disinclined to believe Congress ever intended preclusion in federal ADEA suits. *See also Frank v. Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-38 (S.D.N.Y. 1988) (declining to reach issue of Congressional intent to give preclusive effect when grievant did not litigate same issues and claims in state agency).

Second, Section 14(a) of the ADEA, 29 U.S.C. § 633(a), provides:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to [age discrimination] except that upon commencement of action under this chapter such action *shall supersede any State action*.

(Emphasis added.) Congress clearly required that "any" state action, which necessarily includes prior agency fact-finding, be superseded for the purposes of the federal suit by federal proceedings and federal fact-finding.[2] Indeed, Congress enacted the sixty-day deferral mechanism "to give state agencies a limited opportunity to resolve problems of employment discrimination," *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (ADEA grievant may not sue in federal court until he commences state agency proceedings, but the dismissal of the complaint as untimely by the agency does not preclude federal suit), and "to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings," *id.* at 756 (emphasis added). There would be little

2 In *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1049 n.7 (2d Cir. 1982), we determined that the automatic supersedure provision "stayed" state age-discrimination proceedings in the sense that it neither extinguished state claims nor cancelled state proceedings. There, grievants sought to continue pursuing their age discrimination claims in a state agency after federal proceedings terminated with a court-approved stipulation between the Secretary of Labor, who then enforced the ADEA, and the employer Pan American. The grievants were not satisfied with the stipulation obtained by the Secretary on their behalf. We did not have occasion to consider whether state agency findings should have preclusive effect in the federal suit.

reason to give a grievant a second bite at the apple if prior judicially unreviewed fact-finding, adverse to the grievant, were intended to bar a federal court from an independent determination of the matter.

Third, the legislative history clearly indicates that Congress enacted the ADEA because some state age discrimination laws were ineffective or inadequately enforced. *See* 113 Cong. Rec. 31254 (1967) (remarks of Sen. Javits); *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, at 10, *reprinted in* Legislative History of the Age Discrimination in Employment Act of 1967, U.S. Equal Opportunity Employment Commission, at 27. Given this articulated dissatisfaction with some state remedies to redress age discrimination, we believe that Congress intended the federal courts to give no preclusive effect to the judicially unreviewed fact-finding of a state administrative agency.

Fourth, in Title VII cases, the Supreme Court has stated that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings of the EEOC. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n.7 (1982) (Full Faith and Credit Statute bars federal courts from relitigating state agency's finding, affirmed by state court, of no discrimination under Title VII). As the Seventh Circuit stated, "It would . . . be anomalous to conclude that unreviewed state administrative determinations must be given preclusive effect by federal courts when the findings of the EEOC itself do not preclude *de novo* judicial review." *Duggan*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (recognizing private employee's right to trial *de novo* under Title VII, whether EEOC finds no discrimination or fails to make any finding whatever)). *See also Alexander v. Gardner-Denver*, 415 U.S. 36, 44-45 (1974) ("Courts retain [their] broad remedial powers [under Title VII] despite a[n EEOC] finding of no reasonable cause to believe that the Act has been violated.") (citing *McDonnell Douglas*). Moreover, according to the Supreme Court, "it is clear that unreviewed administrative determinations by state agencies . . . should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." *Kremer*, 456 U.S. at 470 n.7 (citing, *inter alia*, *Voutsis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972)).

These principles, developed in Title VII cases, apply as well to ADEA cases. We recently recognized this in *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989):

> Our interpretations of the ADEA rely heavily on decisions arising under Title VII . . . "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 [] (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 [] (1978)).

Astoria asserts, however, that the procedural and remedial provisions of the ADEA derive from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, rather than from Title VII, *see Lorillard*, 434 U.S. at 584-85,

and that preclusion is either a procedural or a remedial issue. We are not persuaded. Some of the ADEA's procedures most relevant to this case were not adapted from the FLSA. The ADEA's deferral mechanism, obviously procedural, comes from Title VII, not from the FLSA. *Oscar Mayer*, 441 U.S. at 755. The ADEA's provision for automatic superseding of state agency action, also obviously procedural, derives from neither Title VII, *id.* at 757, nor the FLSA. In any event, assuming *arguendo* that we should look to the FLSA instead of Title VII for guidance as to the preclusion issue in this ADEA suit, Astoria fails to cite any part of the FLSA or its interpretive caselaw that indicates Congress intended in the FLSA to give preclusive effect to the judicially unreviewed fact-finding of a state administrative agency.[3]

Fifth, we do not believe that Congress could have intended that a grievant who is obligated to file a complaint with the EEOC in order to preserve his right to sue under the ADEA, 29 U.S.C. § 626(d), and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed decision of that agency without having had a chance to make his case in federal court.

Sixth, the ADEA contains numerous provisions indicating a congressional intent to allow ADEA grievants earlier and freer access to federal court than Congress

3 Such caselaw may not exist because the FLSA does not mandate recourse to state agencies. *See Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1227 (3d Cir. 1978) (in banc); *see also Marshall v. Chamberlain Mfg. Corp.*, 601 F.2d 100 (3d Cir. 1979). *Cf.* 29 U.S.C. § 211(b) (authorizing cooperation with state authorities).

has allowed Title VII grievants.[4] For example, the ADEA requires a grievant to wait only 60 days at most after the commencement of state proceedings before filing suit in federal court. 29 U.S.C. § 633(b). By contrast, Title VII requires the grievant to wait up to 60 days after commencing state proceedings before filing a charge with the EEOC, 42 U.S.C. § 2000e-5(c); *Duggan*, 818 F.2d at 1295, and thereafter to wait up to 180 days before commencing suit in federal court, 42 U.S.C. § 2000e-5(f)(1).[5] In addition, the ADEA does not give the state agency exclusive jurisdiction. *Oscar Mayer*, 441 U.S. at 757; *Duggan*, 818 F.2d at 1296. By contrast, Title VII gives the state agency an initial period of exclusive jurisdiction. 42 U.S.C. § 2000e-5(c). Since Congress clearly intended ADEA grievants to have earlier and freer access to federal court,[6] and since Congress did not intend Title VII suits to be precluded by prior agency fact-finding, we conclude that Congress intended that prior agency fact-finding which has not

4 The ADEA is more grievant-protective in other areas. The ADEA provides for liquidated damages that are punitive in nature, *Trans-World Airlines, Inc. v. Thurston*, *supra*, while Title VII does not, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2375 n.4 (1989); *see also Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 392 (1979) (White, J., dissenting). The ADEA also provides for jury trial. *Lorillard*. Title VII does not. *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981). *See also Patterson*, 109 S. Ct. at 2391 (Brennan, J., dissenting). The ADEA is also more grievant-protective than is the FLSA. *See Dunlop*, 672 F.2d at 1053 n.10.

5 The grievant need not wait the full 60 days if the state proceedings are earlier terminated. 42 U.S.C. § 2000e-5(c). Nor need the grievant wait the full 180 days if the EEOC dismisses the charge before the 180-day period is over. 42 U.S.C. § 2000e-5(f)(1).

6 *See also Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America*, 772 F.2d 348, 351 (7th Cir. 1985) ("The policy of deference to state authority . . . is weaker [in the ADEA] than in Title VII . . . ."), and *Delgado*, 815 F.2d at 646 (citing *Martinez*).

been judicially reviewed should not be accorded preclusive effect in ADEA suits. *See Duggan*, 818 F.2d at 1296-97.

These considerations are given added weight by the opinion of the EEOC expressed in its *amicus* brief. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Duggan*, 818 F.2d at 1296.

The district court read *Elliott* to require preclusion in this case because the ADEA does not instruct the EEOC to give "substantial weight" to prior state agency decisions. According to the district court, the background rule, operative in the absence of the "substantial weight" provision, is that preclusion applies. However, as we read *Elliott*, there is no reason to think that the absence of the phrase "substantial weight" from the ADEA disposes of the preclusion issue.[7] In holding that judicially unreviewed state agency fact-finding could not preclude a Title VII suit in federal court, the *Elliott* Court mentioned the "substantial weight" provision as only one piece of evidence concerning congressional intent. Far from resting its conclusion on the phrase "substantial weight," the Court in *Elliott* also grounded its decision on *Chandler v. Roudebush*, 425 U.S. 840 (1976) (under Title VII, federal employees have same right to *de novo* federal trial following federal agency's finding of no discrimination as do private employees).

The "substantial weight" provision was added in the 1972 amendments to Title VII in order to increase, not decrease, the EEOC's deference to state agency fact-

7 Although the presence of the provision is dispositive because logically incompatible with preclusion, other considerations may also justify the conclusion that Congress intended no preclusion, as our discussion above indicates.

finding. *Kremer*, 456 U.S. at 474-75 and n.16.[8] "Prior to the 1972 amendments, the EEOC was free to ignore state administrative decisions." *Id.*; *see also id.* at 470-71 n.8.[9] In other words, the background rule with respect to the ADEA, operative in the absence of the "substantial weight" provision, is that preclusion does *not* apply. Since the words "substantial weight" do not appear in the ADEA, the logical conclusion is that the EEOC and, by extension, the federal courts are still free to ignore judicially unreviewed findings of no age discrimination made by state agencies. Thus, the judicially unreviewed DHR findings should have no preclusive effect whatever in Solimino's federal suit.

Reversed and remanded for further proceedings.

8 The Seventh Circuit relied on this piece of legislative history in *Duggan*, 818 F.2d at 1297. The district court found it of little value, and the Eighth Circuit in *Stilliano* ignored it.

9 "Congress is presumed to be aware of an administrative . . . interpretation of a statute *and to adopt that interpretation* when it re-enacts a statute without change . . . ." *Lorillard*, 434 U.S. at 580-81 (citations omitted) (emphasis added). In 1986, Congress amended numerous provisions of the ADEA but did not alter § 14, 29 U.S.C § 633. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. Prior to the 1986 amendments, the EEOC interpreted § 14 as it does today, giving substantial weight, at most, but not preclusive effect to unreviewed state agency findings. *See EEOC's Compliance Manual* (CCH) ¶ 285, § 5.5(a)(2) (May 1985), *cited in Duggan*, 818 F.2d at 1296 n.12. Thus, Congress' actions have been consistent with the EEOC's view.

Angelo J. SOLIMINO, Plaintiff,

v.

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant.

No. 85 Civ. 0555.

United States District Court, E.D. New York.

May 31, 1989.

Bank employee brought action against employer alleging Age Discrimination in Employment Act violation. Defendant moved for summary judgment on ground action was time barred and plaintiff was administratively estopped from proving his case. The District Court, Glasser, J., held that New York State Division of Human Rights' decision denying bank employee's age discrimination claim had preclusive effect in federal court action alleging violation of Age Discrimination Act, even though state administrative decision was not reviewed by state court.

Motion for summary judgment granted.

Joseph J. Gentile, Long Island City, N.Y., for plaintiff.

Michael S. Cecere, Jackson, Lewis, Schnitzler & Krupman, New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge:

In this action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, defendant moves pursuant to Fed.R.Civ.P. 56(b) for summary judgment on the grounds that (1) the action is time-barred, and (2) plaintiff is administratively estopped from proving his case. For the reasons stated below, the court grants defendant's motion on the latter ground.

FACTS

Plaintiff joined defendant Astoria Federal Savings & Loan as a teller in October 4, 1945. On March 5, 1982, he was terminated. By that time, he was 63 years old and had reached the position of Vice President of the Mortgage Origination Department.

Plaintiff filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (DHR) on March 18, 1982. DHR held an investigative hearing on November 29, 1982. DHR dismissed the complaint on January 25, 1983, and the State Human Rights Appeal Board affirmed on May 30, 1984.

On July 29, 1983, prior to the Appeal Board's affirmance, plaintiff brought an action in New York State Supreme Court for New York County, naming as defendants several officers and employees of the defendant, the defendant's law firm, and two employees of the DHR. Justice Dontzin construed the complaint as alleging causes of action for wrongful termination of employment, prima facie tort, perjury and conspiracy, and dismissed the entire complaint as against the non-DHR defendants, pursuant to N.Y. Civ.Prac.L. & R. § 3211(a)(7), for failure to state a cause of action. *Solimino v. Drewitz*, No. 22074/83 (Sup. Ct.N.Y.Co. April 16, 1984). Subsequently, Justice Myers dismissed the complaint as against the DHR defendants pursuant to N.Y.Civ.Prac.L. & R. § 3211(a)(7) for failure to state a cause of action. *Solimino v. Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. May 10, 1984). The Appellate Division affirmed both rulings. *Solimino v. Drewitz*, 111 A.D.2d 602, 489 N.Y.S.2d 439 (1st Dep't 1985).

On February 21, 1985, plaintiff filed this action, alleging that defendant had begun to discriminate against him on the basis of age after he turned 56 by denying him salary increases and promotions and by promoting younger people over him, and that defendant had terminated him because of his age.

DISCUSSION

I. STATUTE OF LIMITATIONS

The ADEA's statute of limitations, 29 U.S.C. § 626(e)(1), incorporates by reference the statute of limitations contained in 29 U.S.C. § 255(a), which states in relevant part that an action is

> forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

For the purposes of this motion only, defendant concedes the applicability of the three-year limitations period based on a "willful violation" of the ADEA.

[1] Plaintiff claims that his cause of action accrued on the date he was terminated, March 5, 1982, so that his filing of the complaint on February 21, 1985 was timely. However, the case law uniformly rejects this contention. Rather, plaintiff's cause of action accrued on the date he was notified of his impending termination. *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 42 (2d Cir.1988); *Shockley v. Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir.1986); *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985); *Pfister v. Allied Corp.*, 539 F.Supp. 224 (S.D.N.Y. 1982); *E.E.O.C. v. Kimberly-Clark Corp.*, 531 F.Supp. 58 (N.D.Ga.1981).[1]

The parties agree that plaintiff was notified of his impending termination in a meeting with defendant's president, Henry Drewitz, which occurred sometime soon after a meeting of defendant's board of directors held on Wednesday, February 17, 1982.[2]

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[1] The basis for the decisions cited on this point is to be found in two Supreme Court rulings: *Delaware State College v. Ricks*, 449 U.S. 250, 258-59, 101 S.Ct. 498, 504-05, 66 L.Ed.2d 431 (1980) (limitations period in suit under § 1981 and Title VII ran from date tenure decision was made and plaintiff was notified) and *Chardon v. Fernandez*, 454 U.S. 6, 7, 102 S.Ct. 28, 28, 70 L.Ed.2d 6 (1981) (per curiam) (limitations period in § 1983 suit ran from date plaintiffs received termination letters).

[2] The date of the board meeting is undisputed. The minutes of the board meeting, dated 2/17/82, are annexed as Exhibit A to Affidavit of Plaintiff Angelo J. Solimino, In Opposition to Motion for Summary Judgment.

However, a factual dispute exists over whether plaintiff's meeting with Drewitz occurred on the Thursday or Friday after the board meeting (February 18 or 19, 1982), in which case the action is time-barred, or on the following Monday (February 22, 1982), in which case the action is timely-filed.

Defendant relies principally upon the Charge of Discrimination form which plaintiff filed with the EEOC and the New York State Division of Human Rights on March 18, 1982—no more than a month after the meeting with Drewitz. On that form, plaintiff put down February 18, 1982 as the "date most recent or continuing discrimination took place." Below that line of the form, in the narrative portion, plaintiff stated "I have been given a notice of termination on February 18, 1982[.]" The form was signed under penalty of perjury.

During the investigatory hearing before the State Division of Human Rights on November 29, 1982—over nine months after the Drewitz meeting—Drewitz testified that the meeting occurred on February 19, 1982. Tr.27-28. Solimino's testimony conflicted in several respects with Drewitz's, but did not contradict Drewitz's recollection regarding the date. *Id.*, 29-30. However, Solimino later referred to a meeting with Drewitz—apparently the same meeting—as having occurred on a Monday afternoon. Tr.66.[3] The first Monday after the February 17, 1982 board meeting was February 22, 1982. If that date or any date thereafter were correct, the action would be timely-filed.

Unlike the foregoing evidence, the rest of plaintiff's evidence on the statute of limitations issue dates from a time after this suit was filed, so that plaintiff's statements may reflect an awareness that his entire lawsuit was in danger of being dismissed as untimely.

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[3] While Mr. Solimino's prior consistent statement might be inadmissible hearsay, the hearing transcript in which it appears was attached to *defendant's* moving papers, and defendant sought no evidentiary ruling on its admissibility. Consequently, it is not error for the court to consider it on motion for summary judgment. *In re Teltronics Services*, 762 F.2d 185, 192 (2d Cir.1985) (party opposing summary judgment waived objections to affidavits not made on personal knowledge by not motioning the district court to strike them); *Walker v. Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir.1988), *cert. denied*, ____U.S.____, 109 S.Ct. 791, 102 L.Ed.2d 783 (1989) (same with respect to affidavits containing hearsay); *Williamson v. United States Department of Agriculture*, 815 F.2d 368, 383 (5th Cir.1987) (same).

At his December 1, 1988 deposition in connection with this lawsuit, Solimino steadfastly maintained that the meeting with Drewitz occurred on Monday, February 22, 1982 (Solimino Dep. 112, 117), although he also affirmed that every statement made on his Charge of Discrimination form was correct. Solimino Dep. 85-86.[4]

Finally, in connection with this motion, plaintiff has submitted his own affidavit and that of his wife. The affidavits allege that the meeting with Drewitz occurred on Monday, February 22, 1982.

[2] In considering this motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11 (2d Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d. 762 (1987) (citations omitted). Summary judgment is inappropriate where, as here, a factual dispute exists as to the accrual date of a cause of action, and resolution of that dispute will determine whether or not the action is time-barred. *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F.Supp. 832, 844 (S.D.N.Y.1988). *See also Helm v. South African Airways*, No. 84 Civ. 5404, 1987 WL 13195 (S.D.N.Y. June 25, 1987) (1987 U.S.Dist. LEXIS 5671) (in action under ADEA, fact dispute over date action accrued precluded summary judgment on statute of limitations grounds); *Hawley v. L.B. Smith, Inc.*, No. 82 Civ. 6372-CSH, 1985 WL 334 (S.D.N.Y. Feb. 25, 1985) (LEXIS, Genfed library, Dist. file) (same); *United States v. Becker*, No. 86 Civ. 3946, 1989 WL 34048 (S.D.N.Y. April 4, 1989) (1989 U.S. Dist. LEXIS 3227) (fact dispute over date on which tax assessment was made precluded summary judgment on statute of limitations grounds).

Accordingly, this ground for defendant's motion is rejected.

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[4] The court rejects defendant's contention that plaintiff's deposition testimony at 117-18 is an admission that the February 18, 1982 notice of termination date on the Charge is correct. Clearly, plaintiff merely voiced approval of the March 18, 1982 date stamped on the face of the Charge, indicating when it was received.

II. ADMINISTRATIVE ESTOPPEL

[3] Defendant argues that the unreviewed[5] decision of the New York State Division of Human Rights ("DHR") denying plaintiff's age discrimination claim has preclusive effect in this federal court action. Plaintiff disputes this, and argues alternatively that even if this were true, the DHR hearing did not meet constitutional standards of due process and therefore provides no basis for administrative estoppel.

The court agrees that the DHR hearing, although unreviewed by the state courts, has preclusive effect in this federal court action.

No Supreme Court or Second Circuit opinion deals with the question whether a state agency's unreviewed rejection of an age discrimination claim has preclusive effect in a subsequent federal court action brought under the ADEA. However, two Courts of Appeal have dealt expansively with the issue, reaching opposite conclusions. *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir.1987) (unreviewed agency decision not preclusive); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir.1988) (unreviewed agency decision preclusive).[6]

The conflicting rulings in *Stillians* and *Duggan* reflect divergent interpretations of the Supreme Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). *Elliott* held that an unreviewed state agency determination was not binding on a federal court with respect to a Title VII claim, but was binding with respect to a claim under 42 U.S.C. § 1983.

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[5] The court does not view plaintiff's state court action as having sought or obtained judicial review of DHR's findings as to his age discrimination claim. *See* "FACTS," *supra*.

[6] Other opinions dealing with this issue do so only in *dicta*, or contribute little to the analyses contained in *Duggan* and *Stillians*. The Ninth Circuit found administrative estoppel unavailable on the facts of the case before it in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282-84 (9th Cir.1986), but apparently assumed, without analysis, that unreviewed state agency findings could be preclusive in a federal ADEA suit. The Eleventh Circuit found administrative estoppel unavailable on the facts of the case before it in *Delgado v. Lockheed Georgia Co.*, 815 F.2d 641, 646 (11th Cir.1987), but expressed

(Footnote continued)

As to the Title VII claim, the Court's holding turned on a Title VII provision, 42 U.S.C. § 2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings. The Court noted that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." *Id.*, 478 U.S. at 795, 106 S.Ct. at 3225 (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n. 7, 102 S.Ct. 1883, 1891 n. 7, 72 L.Ed.2d 262 (1982)).[7] Because of the inconsistency between according state agency findings "substantial weight" and according them preclusive effect, the Court concluded that Congress did not intend for state agency findings to bind a federal court in a Title VII suit.

However, with respect to plaintiff's § 1983 claim, the Court reached the opposite conclusion because it found that – in contrast with Title VII – nothing in the language or legislative history of § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226 (quoting *Allen v. McCurry*, 449 U.S. 90, 97, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980)). Observing that it had already approved the concept of administrative estoppel in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), and that administrative estoppel served the same "unifying" function as the Constitution's Full Faith and Credit Clause, the Court held that, absent a showing of contrary Congressional intent, "when a state

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the view in *dicta* that unreviewed state agency findings should *not* be entitled to preclusive effect in federal ADEA suits. *See also Frank v. Capital Cities Communications, Inc.*, 689 F.Supp. 334 (S.D.N.Y.1988) (declining to reach issue where preclusion not available on the facts at bar). The court in *Ibrahim v. New York State Department of Health*, 692 F.Supp. 1471, 1473-74 (E.D.N.Y.1988) adopted the Seventh Circuit's reasoning in *Duggan*, holding that unreviewed state agency findings are not preclusive in federal ADEA suits. Other decisions rendered prior to the Supreme Court's important decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) need not be discussed.

[7] The Court also observed that it had already held in *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) that a *federal* agency's rejection of an employment discrimination claim had no preclusive effect in a subsequent Title VII suit. *Id.*

agency 'acting in a judicial capacity . . . resolves disputed issues of fact before it which the parties have had adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id.*, 478 U.S. at 799, 106 S.Ct. at 3227 (quoting *Utah Construction*, 384 U.S. at 422, 86 S.Ct. at 1560).

Thus, *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion. *Stillians* expanded upon the concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident:

> When interpreting a statute we should not forget what existed before it was enacted. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the rentention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Id., 843 F.2d at 280-81 (brackets and ellipses in the original).

Stillians cautioned that, in determining whether a "statutory purpose" to displace common-law rules of preclusion is "evident," courts must set aside their own legislative and policy preferences and look solely to Congressional intent:

Thus, the most important lesson to be learned from *Elliott* is that when a federal statute does not specifically address a particular issue, in order to decide that issue we must ascertain Congressional intent. Title VII claims are not precluded [by unreviewed state agency findings] because the Court found evidence that Congress intended that result. Likewise, traditional rules of preclusion were left untouched by 42 U.S.C. § 1983 because that was the intent of Congress.

Ascertaining Congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion of what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.
Id., 843 F.2d at 280.

The opinion in *Stillians* went on to hold, in essence, that the presumption favoring retention of common-law rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings. In reaching that conclusion, the Eighth Circuit found the ADEA's lack of any provision like § 2000e-5(b) highly probative, although not dispositive:

> One of the major factors in the Supreme Court's reasoning in *Elliott* was [42] U.S.C. § 2000e-5(b) which provides, in part, that the EEOC must "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 106 S.Ct. at 3225. Because giving substantial weight is inconsistent with giving preclusive effect, the Court had some indication of Congressional intent to guide it.
>
> We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us.

> While we may not wish to imply Congressional intent from the absence of a similar provision, the applicability of *Elliott* to the present case certainly is weakened by its absence. When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.
> *Id.*, 843 F.2d at 281-82.

The court also reasoned that denying preclusive effect to state agency findings would reduce state agency proceedings to little more than a dress rehearsal for a subsequent federal suit under the ADEA:

> For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738 [requiring federal courts to give state court judgments the same preclusive effect they would have in state court], or filing suit anew in the federal district court. Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation.
> *Id.*, 843 F.2d at 282.

The Seventh Circuit, reaching the opposite conclusion in *Duggan*, construed the Supreme Court's decision in *Elliott* as requiring it to "determine whether there are enough parallels between Title VII and the ADEA to justify" the inference that, in drafting the ADEA, Congress meant to reject administrative estoppel. *Id.*, 818 F.2d 1294. In comparing the two statutory schemes, the Seventh Circuit—quite unlike the Supreme Court in *Elliott*—decided to focus on their respective "deferral

mechanisms," meaning the statutory provisions giving the appropriate state agency a "limited opportunity to consider [the claim] before the federal machinery can be set in motion." *Id.*, 818 F.2d at 1295.

First, the court noted that the deferral mechanisms of both Title VII and the ADEA support an inference that state agency findings are not entitled to deference. For example, both statutes permit state agency determinations to be superceded by federal agency action – after 60 days under Title VII, or by filing a claim directly with the EEOC under the ADEA. *Id.*, 818 F.2d at 1295-96 (citing Title VII, 42 U.S.C. § 2000e-5(c) and the ADEA, 29 U.S.C. § 633(b)). Under both statutes, concurrent or subsequent EEOC investigations would be rendered superfluous if the state agency findings had preclusive effect. Furthermore, the court found it "anomalous" to conclude that state agency findings should have preclusive effect when EEOC findings do not. *Id.*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99, 93 S.Ct. 1817, 1822-23, 36 L.Ed.2d. 668 (1973)).[8]

Second, the court found that, to the extent that the ADEA's deferral mechanisms differed from Title VII's, the differences indicate that, "if anything, less deference is due state proceedings under the ADEA than under Title VII." *Id.*, 818 F.2d at 1296. Because the filing of a federal ADEA action stays any state proceedings, the ADEA – unlike Title VII – never affords the state agency a period of exclusive jurisdiction. *Id.*, 818 F.2d 1296 (citing 29 U.S.C. § 633(a)). Moreover, under the ADEA – unlike Title VII – the claimant can file charges with the EEOC and the

[8] The Supreme Court made the same observation in *dicta* in *Kremer*, 456 U.S. at 470 n. 7, 102 S.Ct. at 1891 n. 7, and this *dicta* became the basis of the Sixth Circuit opinion affirmed by the Supreme Court in *Elliott*. *See Elliott*, 478 U.S. at 793, 106 S.Ct. at 3223. However, as previously discussed, the Court's opinion in *Elliott* appeared to rely upon the inconsistency between the "substantial weight" standard of § 2000e-5(b) and the total preclusion available under common law. The Court did not reiterate or appear to rest its decision upon *Kremer's* statement in *dicta* that Congress would not have afforded state agency proceedings preclusive effect while denying such effect to EEOC findings.

state agency simultaneously. *Id.*, 818 F.2d at 1295-96 (citing 29 U.S.C. § 633(b)).

Third, the court addressed what it conceded to be the employer's "strongest argument": namely, that the Supreme Court in *Elliott* focused on Title VII's "substantial weight" provision, § 2000e-5(b), and not on the structure of Title VII's deferral mechanisms, in determining that Congress intended to displace the common law of preclusion in enacting the ADEA. The Seventh Circuit stated that § 2000e-5(b) "is simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit. Thus, it is not surprising that the Court in *Elliott* heavily relied on this provision. The absence of a comparable section in the ADEA is certainly not fatal to [plaintiff]." *Id.*, 818 F.2d at 1296.[9]

[9] Relying on a footnote in *Kremer*, the Seventh Circuit noted that the legislative history of the 1972 amendments to Title VII indicates that Congress added the "substantial weight" provision of § 2000e-5(b) in order to *increase* the EEOC's deference to state agency findings, which the EEOC previously had been free to ignore. The court concluded that it would be "far-fetched" to construe the ADEA's *lack* of a provision *increasing* deference to state agency findings as indicating that Congress intended to give preclusive effect to such findings. *Id.*, 818 F.2d at 1297 (citing *Kremer*, 456 U.S. at 470 n. 8, 102 S.Ct. at 1892 n. 8).

It is true, as the Seventh Circuit observed, that in *Kremer*, the Supreme Court invoked this bit of legislative history to find that Title VII's "substantial weight" provision could not have implicitly repealed a federal statute (28 U.S.C. § 1738) granting state court judgments "full faith and credit" in federal court. However, in the same footnote, the Court found it "even more implausible" to find an implied repeal of § 1738 in Title VII's *deferral* provision, 42 U.S.C. § 2000e-5(c) – the very provision upon which the Seventh Circuit's analysis largely turns. *Kremer*, 456 U.S. at 470 n. 8, 102 S.Ct. at 1892 n. 8.

In short, *Kremer* features language inconsistent with the reasoning of *both* the Seventh and Eighth Circuits. Moreover, its reading of § 2000e-5(b) is manifestly inconsistent with *Elliott's* reading of the same provision. Since *Kremer* is not as recent as *Elliott*, and since *Kremer* involved the preclusive effect of a state *court* judgment under § 1738 rather than the preclusive effect of an unreviewed state agency finding under the federal common-law rules of preclusion applicable here, the court will be guided by *Kremer* only where it is consistent with *Elliott*. *See Elliott*, 478 U.S. at 794, 106 S.Ct. at 3224.

The Seventh Circuit's opinion depends upon its debatable assumption that the Supreme Court in *Elliott* became so thoroughly distracted by "the most obvious piece of evidence"—*i.e.*, the "substantial weight" provision contained in § 2000e-5(b)—that it failed to articulate the true basis of its decision—*i.e.*, the lack of deference implicit in the structure of Title VII's "deferral mechanisms." This court will not make that assumption. The Supreme Court is capable of articulating its reasoning and its reasoning in *Elliott* is clearly articulated.

Furthermore, the Seventh Circuit's opinion improperly conflates the issues of "deferral" and "preclusion." The Supreme Court has not been receptive to similar attempts to read more into the deferral provisions of Title VII and the ADEA than the structure and purpose of those provisions will support. *See Kremer*, 456 U.S. at 470 n. 7, 102 S.Ct. at 1891 n. 7 (it would be "implausible" to find that Title VII's deferral provision implicitly repealed the federal statute granting state court judgments preclusive effect in federal court when "that [deferral] provision does not even address the issue of the proper weight to be afforded state decisions"); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756-57, 99 S.Ct. 2066, 2071-72, 60 L.Ed.2d 609 (1979) (rejecting argument that differences between deferral provisions of Title VII and ADEA indicated that "the ADEA pays less deference to state agencies and that, as a consequence, ADEA claimants have the option to ignore state remedies").

Deferral and preclusion are not equivalent in effect or purpose. Deferral mechanisms simply give the state agency the "first crack" at the claim. Preclusion, in contrast, gives the state agency the "last word" on the claim in a limited class of cases (*i.e.*, those in which the state agency rules within 60 days, or rules after 60 days but before the claimant files a federal action. *See* 29 U.S.C. § 633(a) and (b)). Deferral "is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Evans*, 441 U.S. at 756, 99 S.Ct. at 2071. While preclusion, like deferral, helps conserve judicial resources, it "also serves the value of federalism," and, like the Constitution's Full Faith and Credit clause, " 'act[s] as a nationally unifying force.' " *Elliott*, 478 U.S.

at 798-99, 106 S.Ct. at 3226-27 (quoting *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 289, 100 S.Ct. 2647, 2664, 65 L.Ed.2d 757 (1980) (White, J., concurring in judgment)). Thus, preclusion serves a more important value than deferral, and statutory deferral mechanisms are not an accurate indicator of Congressional intent to displace common-law rules of preclusion.

Rather than comparing the ADEA's deferral mechanisms to those in Title VII, the proper inquiry under *Elliott* is whether or not any provision of the ADEA evinces a Congressional intent to "contravene the common-law rules of preclusion[.]" *Elliott*, 478 U.S. at 797, 106 S.Ct. at 3226; *accord Stillians*, 843 F.2d at 281.[10] More specifically, the approach taken by the Supreme Court in *Elliott* dictates that the court examine the ADEA to see whether it contains any provision—like the "substantial weight" provision of Title VII—which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect.

The court finds no such provision in the ADEA. Moreoever, had Congress wanted to demonstrate an intent to displace the common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII. As the Eighth Circuit stated in *Stillians*, "[o]nly Congress legislates and only Congress can amend." *Id.*, 843 F.2d at 280. This court would be implicitly amending the ADEA if it were to hold that the ADEA displaces common-law rules of preclusion. The court declines to do this. Rather, following *Elliott* and *Stillians*, it will adhere to the presumption that state findings—including

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[10] The Eighth Circuit recognized this in *Stillians* when it rejected the Seventh Circuit's methodology of "reason[ing] by analogy" from the provisions of Title VII:

> Comparing the ADEA with Title VII and 42 U.S.C. § 1983 [as the Seventh Circuit did in *Duggan*] does not address the ultimate issue whether Congress intended to abrogate traditional rules of preclusion when it enacted the ADEA. Even if the ADEA more closely parallels Title VII and § 1983, if Congress did not intend to abrogate preclusion when it enacted the ADEA, then preclusion should still apply. We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own rather than merely compare and contrast it with Title VII. *Id.*, 843 F.2d at 281 (footnote omitted).

unreviewed state agency findings – can have preclusive effect in an ADEA action in federal court.

This result does not denigrate the important right protected by the ADEA. The Supreme Court in *Elliott* found that unreviewed state agency findings have preclusive effect even in cases brought under 42 U.S.C. § 1983 to vindicate fundamental liberty and property rights guaranteed by the Constitution. There is no reason to suppose that a right created by statute should be accorded greater solicitude, absent a showing that Congress intended to do so.

[4] The court also rejects plaintiff's argument that the hearing afforded him by the state agency failed to meet the requirements of constitutional due process.

The elements of administrative estoppel are:

1) the agency was acting in a judicial capacity;

2) the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them; and

3) the courts of that particular state would give the agency's factfinding determinations preclusive effect. *Elliott*, 478 U.S. at 797-98, 106 S.Ct. at 3225-26 (quoting *Utah Construction*, 384 U.S. at 422, 86 S.Ct. at 1560); *Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir.1987).

The agency obviously was acting in a judicial capacity, and the court's independent reading of the hearing transcript persuades it that the parties – each of whom were represented by counsel – had adequate opportunity to litigate the factual disputes resolved by the agency. Moreover, the Supreme Court has confirmed the constitutional adequacy of a virtually identical procedure used by the same New York agency to adjudicate employment discrimination charges. *Kremer*, 456 U.S. at 479-85, 102 S.Ct. at 1896-99; *accord Kirkland*, 828 F.2d at 107-09. Finally, the Second Circuit has held that New York state courts would

give preclusive effect to a DHR hearing. *Kirkland*, *supra*. *See also Brugman v. City of New York*, 102 A.D.2d 413, 477 N.Y.S.2d 636 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195 (1985). Thus, all the elements of administrative estoppel have been satisfied here.

Having determined that unreviewed state agency findings can have preclusive effect in a federal ADEA suit, and that the unreviewed state agency finding in this case is entitled to such deference, all that remains is to determine the effect of those findings on plaintiff's cause of action under the ADEA. The state agency found the following facts:

> The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

Determination and Order After Investigation, annexed as Exhibit 6 to the Moving Affidavit of Anthony H. Atlas.

Since these findings bind this court, the plaintiff cannot prove his claim under the ADEA that his employer "discharge[d him] or otherwise discriminate[d] against [him] with respect to his compensation, terms, conditions, or privileges of employment, because of [his] age[.]" 29 U.S.C. § 623(a)(1).

Accordingly, defendant's motion for summary judgment is granted.

SO ORDERED.

EXCERPTS FROM AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization–

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)[1] Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the–

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownerhsip or financial control,

of the employer and the corporation.

(Publ.L. 90-202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub.L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub.L. 97-248, Title I, § 116(a), Sept. 3, 1982, 96 Stat. 353; Pub.L. 98-369, Title III, § 2301(b), July 18, 1984, 98 Stat. 1063; Pub.L. 98-459, Title VIII, § 802(b), Oct. 9, 1984, 98 Stat. 1792.)

[1] So in original. Two subsecs. (g) have been enacted.

[See main volume for text of (a) to (f)]

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(i)[1] Employees pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such

employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(As amended Pub.L. 99-272, Title IX, § 9201(b)1), (3), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-509, Title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub.L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233.)

[1] So in original. Two subsecs. (i) have been enacted.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub.L. 90-202, § 14, Dec. 15, 1967, 81 Stat. 607.)

EXCERPTS FROM NEW YORK HUMAN RIGHTS LAW

§ 296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

§ 298. Judicial review and enforcement

Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record of all prior proceedings and the issuance and service of a notice of motion returnable before such appellate division of the supreme court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of fact on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with

the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of such order.

L.1951, c. 800; amended L.1952, c. 285, § 7; L.1962, c. 310, § 135; L.1968, c. 958, § 8; L.1978, c. 225, § 1.

§ 298. Judicial review and enforcement [As amended, 1985]

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complairt may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as provided in this section. Such proceeding shall be brought in the supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a notice of petition and petition in such court. Thereafter, at a time and in a manner to be specified by rules of court, the division shall file with the court a written transcript of the record of all prior proceedings. Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided

he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within sixty days after the service of such order.

(As amended L.1984, c.83, § 3; L1985, c. 340, § 1; L.1988, c. 505, § 1.)

STATE OF NEW YORK
Executive Department

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center *NOTICE OF ORDER*
New York, New York 10047
Tel: 488-2038 (area code 212)

To: All Parties to this Proceeding – APPEAL NO. 8948

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Please note:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

Attachment:

Form B8

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD *O R D E R*

Case No. 1 E-E-A-82-82993A
APPEAL NO. 8948
HEARING SCHEDULED: December 21, 1983

ANGELO J. SOLIMINO,

Complainant-Appellant

– vs. –

ASTORIA FEDERAL SAVINGS AND LOAN,

Respondent

PRESIDING: Honorable Tibby Blum

SUBMISSION ON THE RECORD:

Complainant-Appellant submits on the record

Respondent deemed submitted on the record

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *State Division of Human Rights* v. *Columbia University, et al*, 39 N.Y.2d 612 and *State Office of Drug Abuse* v. *State Human Rights Appeal Board*, 48 N.Y.2d 276, and

A majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or characterized by an abuse of discretion, it is

ORDERED that the Determination and Order of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

s/

Thomas A. Conniff
Acting Chairman

Dated & Mailed: May 30, 1984
TO: (See list attached)

STATE HUMAN RIGHTS APPEAL BOARD APPEAL NO. 8948

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